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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HUE SCOTT SNOWDEN, MICHAEL D. POWERS, and
PHILLIP ANDREW SCHORR

Appeal 2009-006637
Application 10/723,408
Technology Center 1700

Decided: May 06, 2010

Before BRADLEY R. GARRIS, PETER F. KRATZ, and
MARK NAGUMO, *Administrative Patent Judges*.

GARRIS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 23, 25, 28-31, 34-37, 39, and 40. We have jurisdiction under 35 U.S.C. § 6.

We REVERSE.

Appellants claim a topically treated nonwoven fabric laminate comprising an antistatic agent applied over a coating of non-ionic fluoropolymer on one side of the laminate (claim 23).

Representative claim 23 reads as follows:

23. A topically treated nonwoven fabric laminate, the nonwoven fabric laminate comprising at least one spunbond layer and at least one meltblown layer, and the laminate further comprising a dried coating of a non-ionic fluoropolymer composition on said spunbond and meltblown layers, said composition applied in solution form to said laminate so as to permeate and coat all layers of said laminate; and wherein the nonwoven fabric laminate further comprises an antistatic agent applied over said coating of non-ionic fluoropolymer on one side of said laminate, and wherein the antistatic agent is an organic phosphate ester.

The references set forth below are relied upon by the Examiner as evidence of obviousness:

Gilbert	4,000,233	Dec. 28, 1976
Simpson	5,023,130	Jun. 11, 1991
Potts	5,145,727	Sep. 08, 1992
Evers	5,296,282	Mar. 22, 1994

Under 35 U.S.C. § 103 (a), the Examiner rejects claims 23, 25, 28-31, and 34-37 as being unpatentable over Potts, Simpson, and Gilbert and rejects claims 39 and 40 as being unpatentable over Potts, Simpson, Gilbert, and Evers.

In rejecting representative claim 23, the Examiner acknowledges that in Potts' laminate the antistatic agent is applied internally in admixture with the fluoropolymer rather than externally over a coating of the fluoropolymer as claimed by Appellants (Ans. 7). Nevertheless, the Examiner concludes that

it would have been obvious to one having ordinary skill in the art at the time the invention was made to externally apply the antistatic agent to the laminate, rather than apply an internal antistatic agent, motivated by a desire to provide the laminate with an immediate antistatic effect and/or to avoid color problems and/or to avoid static buildup [as taught by Gilbert]

(*id.*).

Appellants correctly explain that Potts' laminate is made by extruding fibers from a melt which contains additives such as an antistatic agent and fluoropolymer (Potts abst., col. 10, ll. 20-47, col. 13, l. 27-col. 14, l. 36) whereby the additives will spontaneously migrate to the surfaces of the fibers as they are formed and thereby provide the fiber surfaces with the characteristics of the additives such as an antistatic characteristic (Potts col. 6, ll. 6-33). In this way, Potts avoids the need for a post-formation treatment of the fibers (*id.*). Appellants are also correct in explaining that Gilbert teaches applying an antistatic agent to the surface of a parison for thermoplastic tubes such as bottles in order to avoid the slow migration (e.g., three days or more) and color problems which occur when antistatic agents are compounded into the resin as opposed to being coated onto the surface of the finished article (Gilbert col. 1, ll. 6-46).

Appellants argue that an artisan would not have combined Potts and Gilbert in order to obtain an immediate antistatic effect as proposed by the Examiner because Potts teaches spontaneous antistatic migration in forming the laminate fibers (Appeal Br. 8).

We agree. Since Potts teaches that migration occurs spontaneously, the migration delay taught by Gilbert is not a problem in forming the

laminate fibers of Potts. The Examiner's opposing view is contrary to the express teachings of Potts.

Appellants also argue that the proposed combination would not have been made in order to avoid color problems as stated by the Examiner because the color problems taught by Gilbert are not relevant to the laminate of Potts (Appeal Br. para. bridging 8-9). According to Appellants, Potts contains no hint or suggestion of any such color problems (*id.*).

The Examiner offers the following rebuttal to this argument:

Regarding the color problems associated with antistatic agents in melt extruded thermoplastic polymer compositions, as disclosed by Gilbert (column 1, lines 6-20 and lines 41 - 46), the applicant asserts that said color problems are not applicable to micron-sized fibers simply because Potts does not mention said color problems. The examiner respectfully disagrees. The mere absence of a positive recitation of a problem is not basis for an assumption of the exclusion of a problem. The applicant has failed to show that the melt extruded thermoplastic polymer color problems disclosed by Gilbert do not relate to the melt extruded thermoplastic polymer compositions of Potts.

(Ans. 11).

The deficiency of the Examiner's rebuttal is that it confuses the burdens of an examiner and an applicant. It is an examiner's initial burden to establish a *prima facie* case of unpatentability. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). If examination does not produce a *prima facie* case of unpatentability, then without more an applicant is entitled to a patent (*id.*). Therefore, in the rejection under consideration, it is the Examiner's burden to provide evidence showing that Potts and Gilbert would have been combined in order to avoid color problems.

As correctly argued by Appellants, the record contains no evidence that the laminate of Potts suffers any color problems. This argument reveals that the Examiner's motivation to combine the references is based on unsupported speculation. Contrary to the Examiner's belief, Appellants are under no obligation to provide a showing in support of this argument. The Potts reference itself supports Appellants' argument.

Finally, an artisan would not have combined Potts and Gilbert in order to avoid static buildup as urged by the Examiner. This is because the unmodified laminate of Potts already avoids static buildup due to the presence of an antistatic agent in the melt from which the laminate fibers are extruded.

For the above-stated reasons, the Examiner has failed to establish a prima facie case of obviousness in the proposed combination of Potts and Gilbert. Therefore, we cannot sustain the § 103 rejections on appeal.

The decision of the examiner is reversed.

REVERSED

Ssl

STEPHEN E BONDURA
DORITY & MANNING PA
P.O. BOX 1449
GREENVILLE, SC 29602